

**SEP 03 2003**

*On the House v. Federal Express*  
Nos. 02-56158 and 02-56234

**CATHY A. CATTERSON**  
**U.S. COURT OF APPEALS**

RAWLINSON, Circuit Judge, dissenting:

I respectfully dissent from the majority disposition, because Fed Ex's newly minted argument that its press release did not purport to amend the Service Guide is simply not supported by the record in this case, and because Fed Ex's notice of claim requirement could not serve to bar Plaintiffs' action.

In its Answer to the Complaint, Fed Ex admitted that it "amended its July 1, 1997 Service Guide effective July 31, 1997 to, among other things, suspend its Money-Back Guarantees." (Excerpts of Record 37). Fed Ex included this admission as an "undisputed fact" (ER 861), and argued it before the district court (ER 333).

Fed Ex continued the amendment theme in its briefs on appeal (Red Brief at 13 and Gray Brief at 3) and at oral argument, until a question from one of the panel members alerted Fed Ex's counsel that it might be wise to abandon the amendment argument.

The fact is that the Press Release did not reference the *force majeure* clause in the Service Guide or rely upon it. The Press Release was an ineffective attempt to amend the Service Guide, as reflected by Fed Ex's subsequent amendment of

the Service Guide in accordance with its provisions.

The majority disposition cites the Restatement of Contracts for the proposition that because Fed Ex “did not know of any different meaning [of the Press Release] attached by [the Plaintiffs] and [the Plaintiffs] knew the meaning attached by [Fed Ex],” the Service Guide must be interpreted as Fed Ex urges. However, the record in this case contains no evidence that Fed Ex “did not know of any different meaning attached by” its customers. The record is silent on that point. There is also nothing in the record reflecting that Fed Ex’s customers “knew the meaning attached by [Fed Ex to the Press Release].” To the contrary, one reading the Press Release could easily be confused as to exactly what Fed Ex intended to convey. The Press Release statement that “[a]s provided in our Service Guide and until further notice, we will not offer money-back guarantees” conflicts directly with the Service Guide provision offering a money-back guarantee if the package was not delivered as promised. A customer reading the Press Release and the Service Guide together would not inevitably conclude that Fed Ex’s unstated reliance on the *force majeure* clause was the basis for its suspension of the money-back guarantee. As the district court recognized, a customer could more readily conclude that Fed Ex was bound by the money-back guarantee as provided in its Service Guide. Because the portion of the

Restatement of Contracts cited in the majority disposition is not germane to this case, and no case authority undergirds the conclusion reached by the majority on this point, I cannot join the majority's ruling on the Press Release issue.

There is case authority on the notice-of-claim issue which, in my view, is contrary to the majority holding that Plaintiffs' failure to comply with Fed Ex's internal claims procedures bars the filing of a damages action in court.

We recently addressed a similar issue in *Employers Ins. of Wausau v. Granite State Ins. Co.*, 330 F.3d 1214, 1218, n.5 (9th Cir. 2003). We rejected Granite's argument, similar to that urged by Fed Ex, that the insurance policy's claim requirement imposed a de facto statute of limitations upon the filing of a subrogation action. We held that "'claim,' in the context of the Granite insurance policy, refer[red] to notice rather than the filing of a complaint." Analogous reasoning applies to the Fed Ex Service Guide notice-of-claim provision. No principled basis exists to distinguish Fed Ex's notice-of-claim provision from Granite's. Therefore, I read our precedent as dictating a ruling that Fed Ex's notice-of-claim provision merely gives notice to Fed Ex for payment of claims, rather than imposing limitations upon the Plaintiffs' ability to bring a damages action.

In summary, I would uphold the district court's ruling that Fed Ex's Press

Release did not effectively amend the Service Guide, and hold that the notice-of-claim provision did not bar Plaintiffs' action against Fed Ex. Accordingly, I respectfully register my dissent.